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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 350

The Los Angeles Herald-Examiner, Division of The Hearst Corporation; and The San Francisco Examiner, Division of The Hearst Corporation,

Petitioners,

vs.

Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board; San Francisco-Oakland Newspaper Guild, Newspaper and Periodical Drivers' and Helpers' Union Local 921; Los Angeles Web Pressman's Union No. 18; Los Angeles Stereotypers' Union No. 58; Los Angeles Typographical Union No. 174; International Association of Machinists and Aerospace Workers, District Lodge No. 94; General Warehouseman's Union Local 598; Building Service and Maintenance Employees Union No. 399; Los Angeles Mailers' Union No. 9; and Los Angeles Paper Handlers' Union No. 3,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF POSITION OF PETITIONER

And

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF POSITION OF PETITIONER.

Comes now the United States Chamber of Commerce (hereinafter called "the Chamber",) by its attorneys, Milton A. Smith, Anthony J. Obadal, Lawrence M. Cohen and Theodore J. Tierney, and respectfully requests leave under Supreme Court Rule 42 to file a brief as *amicus*

curiae supporting the petition of petitioner, the Los Angeles Herald-Examiner, Division of Hearst Corporation, and the San Francisco Examiner, Division of the Hearst Corporation, urging the court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth District, for the following reasons:

1. The Chamber of Commerce of the United States is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000, and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

2. The Chamber has appeared as *amicus curiae* in labor relations matters which have effected employers in a wide variety of enterprises. Matters of particular concern in which the Chamber has recently filed *amicus* briefs involve: the dictation by the National Labor Relations Board of the terms and conditions of collective bargaining agreements;[1] the question of whether or not it is necessary, in order to establish a violation of Section 8(b)(4)(B) of the Act, to show that a union's object is to bring about a total cessation of business between the neutral and primary employer;[2] and the question of whether or not the Norris-LaGuardia Act prevented the federal courts from issuing injunctions regarding strikes in violation of collective bargaining agreements.[3]

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1. Brief *amicus curiae* in *H. K. Porter Company* v. *NLRB*, No. 230, October Term, 1969.

2. Brief *amicus curiae* in *Burns and Roe, Inc.* v. *Operating Engineers*, No. 570, October Term, 1969.

3. Brief *amicus curiae* in *Boys Markets* v. *Clerk's Union*, No. 768, October Term, 1969. In addition, the Chamber filed an *amicus* brief in the earlier but related case of *Avco Corp.* v. *Aero Lodge 735*, 390 U. S. 557 (1968).

3. The subject of the instant case—the standing of a charging party to appeal an adverse judicial determination in a proceeding for temporary injunctive relief against an unlawful secondary boycott—is a matter of substantial concern to the Chamber. In 1947 and 1959, Congress sought to protect neutral bystanders from being embroiled in the labor disputes of others. Despite the enactment of the Taft-Hartley Act and the Landrum-Griffin amendments to the National Labor Relations Act, however, many unions continue to resort to unlawful secondary conduct to achieve their goals.[4]

The injunctive protection afforded by Section 10(l) of the National Labor Relations Act is the only defense available to employers who are the victims of unlawful secondary boycotts. Any dilution of the effectiveness of this remedy by restricting the neutral employer's participation in 10(l) proceedings can only encourage industrial strife rather than promote free collective bargaining and harmonious labor-management relations. If this motion for a leave to file an *amicus* brief is granted, the Chamber will offer for the Court's consideration the broader viewpoint regarding the vital interest of all employers in maintaining to the fullest possible extent the remedies provided by Congress to combat the unlawful secondary boycott.

4. The Chamber, pursuant to Rule 42 of the Rules of this Court, requested consent from all parties to file a brief *amicus curiae* in this matter. While consents were forthwith received from the Honorable Erwin N. Griswold, Solicitor General of the United States and from the petitioner,

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4. Of the total unfair labor practice charges filed against unions under Section 8(b) of the Act during NLRB fiscal years 1967 and 1968, *32 per cent, or nearly 3700 charges*, involved alleged violations of the secondary boycott provisions of Section 8(b)(4). *Thirty-second Annual Report of the National Labor Relations Board*, p. 218 (1967); *Summary of Operations of NLRB General Counsel*, reprinted in 70 LRR 459 at 468 (1969).

The Los Angeles Herald-Examiner and The San Francisco Examiner, Divisions of Hearst Corporation, consent was not received from the following named respondents:

San Francisco Oakland Newspaper Guild, Newspaper and Periodical Drivers' and Helpers' Union Local 921; Los Angeles Web Pressman's Union No. 18; Los Angeles Stereotypers' Union No. 58; Los Angeles Typographical Union No. 174; International Association of Machinists and Aerospace Workers, District Lodge No. 94; General Warehouseman's Union Local 598; Building Service and Maintenance Employees Union No. 399; Los Angeles Mailers' Union No. 9; and Los Angeles Paper Handlers' Union No. 3.

WHEREFORE, in recognition of these considerations and in view of the importance of the issues involved to all member-employers, whose consensus the Chamber is authorized to set forth before the Court, it is respectfully requested that this Motion for Leave to File a Brief *Amicus Curiae* be granted for such purposes.

Respectfully submitted,

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BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

INTEREST OF THE AMICUS CURIAE.

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade

associations, with an underlying membership of approximately 5,000,000 business firms and individuals and a direct business membership in excess of 38,000.

The Chamber views this case as one raising recurrent and important questions of first impression involving an area of vital concern to all employers. Congress has recognized that the secondary boycott is a vicious and devastating economic weapon;[1] it is destructive to the free flow of commerce and places the neutral employer in grave jeopardy of losing all or part of his established business. Accordingly, Congress not only outlawed such conduct, but provided an immediate remedy for the protection of the victimized employer by the enactment of Section 10(l) of the National Labor Relations Act.[2] This provision particularly reflects the sense of grave congressional concern that such conduct be terminated. Unlike other provisions of the federal laws, this section:

1. Commands the Board to give the investigation of such charges immediate priority over all other charges, and
2. Orders the Board, without exception or allowance for discretion, to petition a federal district court for temporary injunctive relief pending final adjudication upon a mere showing of reasonable cause to support the merits of the charge.

In addition, the legislative history of this provision only underscores the patent sense of legislative urgency permeating Section 10(l).[3] In the face of such a clear congressional purpose, any erosion of the effectiveness of this

1. See, *e.g.*, II, *Legislative History of the Labor-Management Reporting Act of 1959*, pps. 989, 1376, 1425, 1446, 1842 (1959).

2. National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U. S. C. § 151 *et seq.* (hereinafter referred to as the "Act").

3. Senate Report No. 105, 80th Cong., 1st Sess. (1947).

remedy cannot be sanctioned. Yet, the decision of the court below, if allowed to stand, can only bring about such a result.

Review by this Court is necessary for the additional reason that, despite the far-reaching remedy provided by Section 10(l), neutral employers are being subjected to the unlawful and economically devastating secondary boycott at an alarming rate.[4] In this respect, it is submitted that the remedy designed to prevent such conduct can not be realistically effective unless the courts recognize that "private interests [are] at stake" in Section 10(l) proceedings as this Court has acknowledged regarding proceedings which involve other provisions of the Act.[5] This is so because, once the government institutes 10(l) proceedings, the interest of the neutral employer—the strong self-interest of preserving his business—assures the most vigorous pursuit of the injunctive remedy to halt the unlawful secondary boycott. On the other hand, this Court has recognized that by ignoring the private interest of the employer and, therefore, denying his standing to appeal,

4. Of the total unfair labor practice charges filed against unions under Section 8(b) of the Act during NLRB fiscal years 1967 and 1968, *32 per cent, or nearly 3700 charges*, involved alleged violations of the secondary boycott provisions of Section 8(b)(4). *Thirty-second Annual Report of the National Labor Relations Board*, p. 218 (1967); *Summary of Operations of NLRB General Counsel*, reprinted in 70 LRR 459 at 468 (1969). In additon, over 50% of the charges involving Section 10(l) in 1969 were filed by small employers with less than 30 employees. *Thirty-third Annual Report of the National Labor Relations Board*, Table 18, pp. 238-9, *supra*. Thus, it is all the more important that the Chamber present to the Court the consensus of these small employers who do not have the individual resources for such purposes.

5. *United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Local 283* v. *Scofield, et al.; United Automobile, Aerospace and Agricultural Implement Workers, et al.* v. *Fafnir Bearing Company, et al.*, 382 U. S. 205 (1965).

as the lower court has done here, aggressive pursuit of the statutory remedy cannot be assured.[6]

Moreover, this case raises questions vital to the interests of all employers for the additional reason that injunctive protection afforded by Section 10(l) of the Act extends to unlawful union recognitional picketing and improper "hot-cargo" agreements as well as secondary boycotts.[7] Thus, the protection of this section is the only effective bulwark available to employers subjected to such outlawed

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6. In *Scofield*, the Court stated:

> The Labor Board may also adversely affect the rights of the private parties in other instances. For example, the Board may decide a case and later re-evaluate its position at a time when that case is before an appellate court. The General Counsel, in such a situation, cannot be expected wholeheartedly to attempt to convince an appellate court of the correctness of a doctrine which the Board itself has abandoned.

It is difficult to imagine a more striking example of what the Court was referring to in the above-quoted passage than the case of *Sears, Roebuck and Co. v. Local 419 Carpet Layers*, 90 S. Ct. 1299 (1970). The employer there filed secondary boycott charges and the regional director sought 10(l) temporatory injunctive relief. The district court, however, declined to order such relief, and the regional director elected not to appeal that decision for reasons he refused to disclose (See page 4 of Petitioner's Reply Brief in *Sears, supra*). Yet, subsequently, the Board issued its decision finding that the Union's conduct had violated the secondary boycott prohibition. The employer's attempt to appeal was frustrated by the Circuit Court's holding that it lacked standing; this Court ultimately found the question to be moot because of the issuance of the Board's order.

7. The number of unfair labor practice charges alleging union recognitional picketing in violation of Section 8(b)(7) has been increasing substantially. Between NLRB fiscal years 1966 and 1967, for example, the number of such charges rose 39 percent. *Thirty-second Annual Report of the National Labor Relations Board, supra at* 218; *Thirty-first Annual Report of the National Labor Relations Board*, p. 186 (1966). As in the case of charges alleging unlawful secondary boycotts, if the Board finds reasonable cause to believe that such charges are true and that a complaint should issue, it is *required* under Section 10(l) to petition for appropriate injunctive relief pending the final adjudication by the Board with respect to such matter.

union pressures.[8] Any dilution of this protection, such as that which will be occasioned by the decision below, will foster the very industrial strife the Act was designed to prevent.

These important questions regarding the scope of the employer's right to participate fully and effectively in 10(l) proceedings at all stages goes to the very substructure of the statutory scheme; they transcend both the public and private facets of the statute. Accordingly, the Chamber submits that the questions raised by the petition are of compelling national concern calling for the presentation of its views to this Court.

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8. The protection afforded by a permanent injunction to an employer unlawfully picketed by a union is more illusory than real. The length of time required for the Board to investigate the employer's charge and to issue a complaint, for the Board Trial Examiner and the Board itself then to rule on the complaint and, subsequently, for a Court of Appeals to enforce any resultant Board order largely negates the value to the picketed employer of such a proceeding. In *Sears, supra*, for example, the union commenced its picketing of Sears on August 7, 1968; only recently, the Tenth Circuit Court of Appeals issued its order remanding the case back to the Board for additional findings. *Carpet Layers Local 419* v. *NLRB* (*Sears, Roebuck & Co.*), ... F. 2d ....., 74 LRRM 2444 (D.C. Cir., 1970). Thus, in excess of two years will have elapsed before that case is resolved. Few employers could withstand a secondary boycott of such a duration. Nor can it be said that the delay involved in the *Sears* case is the unusual situation in that respect. See footnote 8 at page 10 of the Petition for Rehearing in *Sears, supra*.

REASONS FOR GRANTING THE WRIT.

1. The Present Case Raises Significant Issues Regarding the Administration of the Act Which Should be Resolved by This Court in the Exercise of Its "General Power to Supervise the Administration of Justice in the Federal Courts." Western Pacific R. Corp. v. Western Pacific R. Co., 345 U. S. 247, 260.

This Court has determined that "both the successful charging party (in *Scofield*) and the successful charging party (in *Fafnir*) have a right to intervene in a Court of Appeals proceeding which reviews or enforces Labor Board orders." *United Auto Workers* v. *Scofield*, 382 U. S. 205, 208. This Court has not, however, determined the corollary and equally important extent to which charging parties may participate in proceedings instituted by the Board for temporary injunctive relief or may participate in subsequent appellate review in such proceedings. Accordingly, numerous and divergent rulings have emerged from the courts of appeal concerning this and related questions. For example, left unanswered by the Court is the significant issue as to the right of charging parties to participate in district court proceedings as parties.[9]

The Ninth Circuit, on the other hand, affirmed the issuance of an injunction under Section 10(l) at the urging of the charging party and over the objection of the Board where the charging party "merely supported the original petition for injunctive relief requested by the Regional

9. *Samhoff* v. *International Association of Machinists, District Lodge No. 1 (Terminal Handling Co.)*, No. 1481, *cert. den.* June 16, 1970, 38 U. S. L. W. 3497. In this case the Third Circuit refused to accord the charging party the status of a "party" and thus refused to afford it the right to object to a proffered Board stipulation.

Director."[10] And in *Sears, Roebuck and Co., supra,* the Tenth Circuit denied the charging party the right to appeal the denial of an injunction by the district court in a 10(l) proceeding. However, contrary to the holding of the lower court in this case, the Second and Sixth Circuits have apparently permitted intervention of the charging party in an appeal of the district court's rulings in 10(l) proceedings. *McLeod* v. *General Electric Co.,* 366 F. 2d 847 (2nd Cir., 1966); *N. L. R. B.* v. *Nashville Building & Construction Trades Council,* 383 F. 2d 562 (6th Cir., 1967). In light of the recurrent nature of these issues and the divergent approaches of the various circuit courts, it is submitted that the Court should grant the petition herein and resolve the highly significant questions presented.

2. The Decision Below Denies the Charging Party Rights Conferred by the Act.

Section 10(l) of the Act expressly provides that charging parties shall be given notice of the filing of a petition for 10(l) relief and "shall be given an opportunity to appear by counsel and present any relevant testimony." This clear congressional acknowledgement of the charging parties' right to participate in such proceedings only underscores this Court's holding in *Scofield, supra,* that the private interests of charging parties cannot be divorced from the overall statutory scheme.

In expressly conferring these participatory rights, Congress must have intended that the charging party also have the right to seek judicial review. Otherwise, the lower court's denial of an injunction, based, for example, on an improper ruling as to the admissibility of the charging party's evidence would completely frustrate the statutory scheme.

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10. *Retail Clerks Union, Local 137* v. *Food Employers Council,* 351 F. 2d 525 (9th Cir., 1965).

The correctness of the foregoing conclusion is supported by the fact that this Court has understandably been sensitive to the procedural rights of private parties in Board and Board-related proceedings,[11] as well as to the rights of private parties in administrative proceedings generally.[12] Moreover, there is no reasonable predicate for allowing the intervention of charging parties, successful or not, at the appellate stage of an unfair labor practice proceeding, as was done in *Scofield*, but denying charging parties the right to intervene at the appellate stage of litigation under another closely related subsection of the same statutory provision—as was done by the court below in this case. Absent clear congressional intent to the contrary, it must be said that Congress intended the parties to have the same procedural rights regardless of what section of the Act was involved in the particular proceedings.[13]

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11. *United Automobile Workers v. Scofield (Fafnir Bearing Co.)*, 382 U. S. 250.

12. See *Association of Data Processing Service Organization, Inc.* v. *Camp*, ... U. S. ....., 25 L. Ed. 2d, 184 (March 3, 1970) and *Barlow* v. *Collins*, ... U. S. ....., 25 L. Ed. 2d 192 (March 3, 1970).

13. As Professor Jaffe observed:

> "The union [in *Scofield*] suggested that if allowed to intervene it could seek Supreme Court review of an adverse decision though the Board were indifferent or opposed. And why not? *If the statute allows a party to appeal from an adverse Board decision why not from an adverse judicial ruling?* I am not a friend to loose intervention practices, to practices which threaten to encumber administrative hearings and judicial review. *But the interest of a charging party—as the statute itself makes clear—is central to the whole proceeding. To allow intervention merely accords to that interest a customary protection.*". Jaffe, *Judicial Control of Administrative Action*, p. 545 (1965) (emphasis supplied; footnote omitted).

3. The Decision of the Lower Court Hinders the Public Interest by Suppressing Evidence and Argument Before the Courts in 10(l) Proceedings.

It is submitted that if the decision of the lower court is allowed to stand, one of the essential objectives of the Act will be frustrated to the detriment of the public interest. Congress entrusted the keys of the closely-guarded labor injunction to the federal district courts in much the same fashion that enforcement of Board orders was reposed in the courts of appeal. That grant of judicial authority was predicated upon the explicit premise that all parties would have unrestricted opportunity to inform the court, by evidence and argument, of all relevant considerations in a given case. This division of responsibility was acknowledged by the Board and expressly recognized by the Court in *Scofield* where it was stated:

> "In fact, the Labor Board itself agrees that intervention by charged parties will not impair effective discharge of its duties and may well promote the public interest . . . Participation in defining the issues before the court guarantees that all relevant material is brought to its attention, and makes the briefs on the merits more meaningful."

There can be no logical reason for applying the *Scofield* doctrine to one stage of an unfair labor practice proceeding but refusing, as did the court below, to apply it to the closely-related injunction sections regarding secondary boycotts. If anything, the more logical postulate is that Congress wanted the fullest possible exposure of facts and arguments in light of the limited time available to the court for consideration of its ruling in a 10(l) proceeding and the overriding concern of Congress regarding this particular violation. Thus, the decision of the court below denying the charging party rights of intervention is clearly

contrary to the public interest facet of the statutory scheme and, accordingly, review by this Court is fully warranted.

4. The Decision of the Court Below Departs From the Better-Reasoned Precedent.

The Ninth Circuit Court of Appeals did not set forth the reasons which prompted it to hold that petitioner herein did not have the right to intervene in the Regional Director's appeal of the trial court's ruling. This approach must indicate, *sub silentio*, that the court below views its earlier decision in *Retail Clerk's Union* v. *Food Employers Council*, 351 F. 2d 525 (9th Cir., 1965) as limiting the participatory rights of a charging party to the district court stage of the litigation, as did the Tenth Circuit in *Sears, Roebuck & Co., supra.* However, no such restriction of the charging parties' essential procedural rights under Section 10(l) was set forth in the court's opinion in *Retail Clerk's, supra.* Moreover, the Ninth Circuit Court's rationale as set forth in the earlier *Retail Clerk's* case fully and logically supports the position of the petitioner here. In that decision, the court below reasoned that since the charging party was only attempting to "support the position of the Regional Director" and was not seeking to "initiate the litigation," the Norris-LaGuardia Act was no obstacle. Here also, the petitioner is merely seeking to support the position of the Regional Director who has initiated the appeal and the Norris-LaGuardia Act should not be read as obstructing such participation.

Review is warranted here for the additional reason that, as the Court held in *Boys Markets* v. *Clerk's Union*, No. 768, October Term, 1969, the earlier enacted provisions of the Norris-LaGuardia Act must be accommodated to the subsequent amendments to the National Labor Relations

Act. In enacting Section 10(l), Congress expressed a clear purpose of protecting the neutral employer from the disruptive effects of unlawful secondary boycotts. The participatory rights granted neutral employers by the explicit terms of Section 10(l) reflects the judgment of Congress that the prosecutorial efforts of the Board's General Counsel alone would not guarantee such protection. As in *Boys Markets*, the earlier enacted provisions of the Norris-LaGuardia Act cannot be interpreted here as overriding this clear congressional objection by stifling the neutral employer's right to participate at all stages of 10(l) injunctive proceedings. Rather, as the Court said in *Boys Markets*, it is "the task of the courts to accommodate, to reconcile the older statutes with the more recent ones." The court below failed to reach such an accommodation, and, accordingly, review by this Court is warranted.

CONCLUSION.

For the foregoing reasons, the Chamber urges this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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